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In the Supreme Court of the United States

MAYRA RIVAS-RODRIGUEZ,
Petitioner,
v.
ERIC H. HOLDER, JR., ATTORNEY GENERAL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Respondent's opposition concedes precisely that which it seeks to deny. Respondent states:

> As relevant here, the court stated that an asylum applicant must establish a fear of persecution based on a protected ground; that "[t]he protected ground must be a central reason for being targeted for persecution"; and that "[a] central reason is one that is more than "'incidental, tangential, superficial, or *subordinate* to another reason for harm.'"" (Emphasis added).

Opp. 5. This definition of "one central reason" applied by the United States Court of Appeals for the Fourth Circuit Court is irreconcilable with the plain language of the statute and is squarely at odds with the definitions adopted by the Courts of Appeals for the Third, Eighth, and Ninth Circuits, despite respondent's arguments to the contrary.

In this case, the Immigration Judge (IJ) specifically found that Ms. Rivas-Rodriguez was targeted as a source of money by gang members and that she "has a well-founded fear of future persecution in that she has sufficiently demonstrated that she has a well-founded fear of being raped in the

future in el Salvador by gang members." Pet. App. 21a-22a. Ignoring for the moment that gang members are unlikely to target the general population for sexual exploitation to obtain money, the Fourth Circuit improperly subordinated her social group membership, holding that she "would be targeted regardless of her membership in her particular social group." Pet. App. 5a. Respondent provides no logical explanation as to how this is not an improper subordination to an overarching unprotected ground. Under this reasoning, where both a protected ground and an unprotected ground are "central reasons" for persecution, a court can always subordinate the protected ground and deny asylum. This is precisely what Congress intended to avoid in the enactment of the REAL ID Act of 2005, to resolve "conflicts between fora" and provide a unified standard for analyzing persecution based on mixed-motives. Pet. 4. Under the Board of Immigration Appeals' (BIA) J-B-N- decision and as adopted by the First, Fourth, and Fifth Circuits, Congress's intent is denied.

Moreover, although respondent's arguments that "no split exists" are imaginative, they mischaracterize what is occurring between the circuits on the proper interpretation of "one central reason." Respondent acknowledges that the Third Circuit in *Ndayshimiye* rejected the BIA's interpretation of INA §208 (Opp. 6-7), but seeks to diminish the Third Circuit's square rejection of the BIA's inclusion of "subordinate" in its interpretation because the term "subordinate" had no bearing on the disposition of the matter at issue and therefore

was dictum. Opp. 7. This is incorrect. The issue at hand was whether the BIA's interpretation was correct, and if not, what the correct interpretation was. The Third Circuit, conducting a careful and thorough *Chevron* analysis, concluded that the BIA's interpretation was incorrect, particularly focusing on the inclusion of "subordinate" as being inconsistent with Congress's intent. Pet. 11-13.

Additionally, respondents attempt to deny that other circuits have reached a similar conclusion as the Third Circuit, when it was the Third Circuit itself in *Ndayshimiye* that pointed to the Ninth Circuit's implicit excision of the word "subordinate" from the BIA's interpretation in *Parussimova*. Pet. 13. The respondent focuses, instead, on the Ninth Circuit's lack of an explicit discussion of the word "subordinate" in the BIA's definition (Opp. 8) and the disposition of the case (Opp. 8-9), both of which are irrelevant to the inquiry. The fact is that both the Ninth and Eighth Circuits, looking at the BIA's definition, have determined that when persecutors have mixed motives, it is irrelevant whether one of the central reasons is more important than the other. Pet. 13-14. Although implicit, both directly address the subordination issue in the BIA's interpretation and squarely reject such a characterization. *Id.* Because the Fourth Circuit Court of Appeals applied a standard that is not consistent with INA § 208(b)(1)(B)(i), and because other Circuit Courts of Appeal have explicitly or implicitly rejected this standard, this case merits this Court's review.

ARGUMENT

A. RESPONDENT'S ARGUMENTS THAT A CIRCUIT SPLIT DOES NOT EXIST ARE INCORRECT

Respondent makes an imaginative, but flawed, attempt to erase (1) an improper interpretation by the BIA of INA §208 and (2) a disagreement between the circuits as to the proper interpretation of INA §208 as intended by Congress when it enacted the REAL ID Act of 2005. In defining the "at least one central reason" standard, the Courts of Appeals have adopted definitions that are fundamentally inconsistent with each other. While the First, Fourth, and Fifth Circuits apply the BIA's definition that requires the protected ground be "more than incidental, tangential, superficial, or subordinate" to another reason, the Third, Eighth, and Ninth Circuits have held that the protected ground need not be dominate to any other reason. *See e.g. Singh v. Mukasey*, 543 F.3d 1, 5 (1st Cir. 2008) (citing *In re J-BN-*, 24 I. & N. Dec. 208 (BIA 2007)); *Quinteros-Mendoza v. Holder*, 556 F.3d 159, 164 (4th Cir. 2009); *Shaikh v. Holder*, 588 F.3d 861, 864 (5th Cir. 2009); *Ndayshimiye v. Attorney General*, 557 F.3d 124, 129-30 (3d Cir. 2009); *Marroquin-Ochoma v. Holder*, 574 F.3d 574, 577 (8th Cir 2009); *Parussimova v. Mukasey*, 533 F.3d 1128, 1135 (9th Cir. 2008), amended by 555 F.3d 734 (9th Cir. 2009).

Respondent concedes that the Third Circuit in *Ndayshimiye* rejected the BIA's interpretation of INA §208, but seeks to diminish the Third Circuit's square rejection of the BIA's inclusion of

"subordinate" in its interpretation because the term "subordinate" had no bearing on the disposition of the matter at issue and therefore was dictum. Opp. 6-8. This is incorrect. The issue at hand was whether the BIA's interpretation was correct, and if not, what was the correct interpretation. The Third Circuit, conducting a careful and thorough *Chevron* analysis, concluded that the BIA's interpretation was incorrect, particularly focusing on the inclusion of "subordinate" as being inconsistent with Congress's intent. Pet. 11-13.

Respondent's reasoning to deny that other circuits have reached a similar conclusion as the Third Circuit is flawed as well. It was the Third Circuit itself in *Ndayshimiye* that pointed to the Ninth Circuit's implicit excision of the word "subordinate" from the BIA's interpretation in *Parussimova*. Pet. 13. The respondent focuses, instead, on the Ninth Circuit's lack of an explicit discussion of the word "subordinate" in the BIA's definition and the grounds for disposing of that particular case, both of which are irrelevant to the inquiry here which is whether the circuits disagree on the proper definition of INA §208. The fact is that both the Ninth and Eighth Circuits, looking at the BIA's definition, have determined that when persecutors have mixed motives, it is irrelevant whether one of the central reasons is more important than the other. Although implicit, both directly address the subordination issue in the BIA's interpretation and squarely reject such a characterization. These opposing definitions cannot be reconciled. In *Parussimova* , the Ninth Circuit

held that the under the revised statute, the protected reason need not be the most important or dominant reason for the persecution. 555 F.3d at 740-41. But, as the Third Circuit explained, the "subordinate" requirement in the BIA's definition imposes a "mirror image of the rejected dominance test." *Ndayshimiye*, 557 F.3d at 129-30. As the Third Circuit's reasoning makes clear, a definition that requires that the protected ground not be subordinate to any other reason is at odds with a definition that holds the protected reason need not be dominant to all other reasons. *See id.* Thus, any court that requires an asylum applicant to demonstrate that the protected ground is not subordinate to any other grounds requires a higher standard of proof than a court that does not require the asylum applicant to demonstrate that the protected reason is dominant to any other reason. Such disparate definitions cannot be squared with each other and could result in inconsistent rulings between the circuits.

B. CONTRARY TO RESPONDENT'S ARGUMENTS, THE FOURTH CIRCUIT SUBORDINATED PEITIONER'S GROUP TO ANOTHER UNPROTECTED GROUND

Respondent argues that Ms. Rivas-Rodriquez, as found by the Fourth Circuit, would have been targeted by gang members regardless of her membership in a particular social group, and that therefore this means that the Fourth Circuit did not follow an improper interpretation of INA §208. Opp.

10-11. This logic is flawed. This is not a case where no well-founded fear of persecution was found. The IJ specifically found that Ms. Rivas Rodriguez was targeted for her money by El Salvadoran gang members and that she had a well-founded fear of future persecution based on a well-founded fear of being raped by those gang members if returned to El Salvador. Pet. App. 21a-22a. Yet, the Fourth Circuit, specifically following the BIA's interpretation in J-B-N-, a definition rejected expressly and implicitly by the Third, Eighth, and Ninth Circuits, subordinated the motives behind her sexual exploitation, finding that she would have been targeted regardless of her membership in a particular social group. Pet. App. 4a-5a. This is precisely what Congress intended to avoid by enacting the REAL ID Act of 2005. Congress intended to resolve the "conflict between the fora" and to provide uniformity in the interpretation of "one central reason." Pet. 3-4. This has not been achieved.

Under the Fourth Circuit's reasoning, unless an appellant would not have been persecuted ***but for*** the protected ground, the appellant may never qualify for asylum under INA § 208(b)(1)(B)(i). But that is simply not the requirement of the statute and such a ruling evades the mixed motive analysis. INA § 208(b)(1)(B)(i) only requires that the protected ground be "at least one central reason" for the persecution, and the evidence demonstrates that Ms. Rivas-Rodriguez' membership in a protected social class was at least one central reason for her persecution, regardless of any other reasons.

CONCLUSION

For the reasons stated above and in the petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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